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IN THE

Supreme Court of the United States

October Term, 1959

No. 803

ABE GIDDINS and INTERSTATE DRESS CARRIERS, INC.,

Petitioners,

—against—

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONERS' REPLY BRIEF

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1.

In view of the government's evasive brief submitted in opposition to the petition for certiorari, it is essential to again quote the precise question propounded by the prosecutor to Justice Di Giovanna of the New York Supreme Court who appeared as a character witness for petitioner Giddins:

> "Q. Have you heard that the defendant Abe Giddins, the individual as to whom you have just testified, is the business partner of Harry Strasser, a convicted dope peddler, and the former business partner of the late Albert Anastasia" (R. 101a).

The vice of this question was: (a) that it was a baseless imputation of partnership in the nefarious activities of a convicted dope peddler and of a notorious gangster and racketeer, and (b) that both court and prosecutor knew that these sinister imputations of criminality were the product of sheer suspicion emanating solely from an illegal partnership "in a dress-contracting establishment" (R. 99a).

The government's brief (pp. 6, 12) asserts that "an offer of proof was made outside the presence of the jury" and that the question propounded in the courtroom "was preceded by a statement by the government outside the hearing of the jury giving the basis for the question".

The fact, however, is that there was no basis whatever for the sinister imputations of partnership in crime which were unmistakably conveyed by the prosecutor's question.

To appreciate the unfairness of the tactics used, it is necessary to view the events in their true setting. To begin with, the prosecutor announced in the presence of the jury: "Your Honor, I have an offer of proof and I wish to do this out of the presence of the jury" (R. 97a-98a). Thereupon, the jury were kept in suspense while a conference was held in chambers, where the prosecutor requested that he be permitted to ask whether the witness had heard that petitioner "was the former business partner *in several corporations* of the late Albert Anastasia and an individual by the name of Harry Strasser, who is a convicted dope peddler" (R. 98a).

When objection was made that "any such question is calculated to inflame the jury without any foundation what-

ever", the court made no attempt to ascertain whether there was a basis for the proposed question. The record shows:

> "The Court: Be that as it may, I think the question is proper if the Government proves it. I can tell you now that I will ask you at the time you ask the question whether you intend to prove that as a fact or prove that as a rumor.
>
> Mr. Shaw: I believe that I can prove it as a rumor and as a fact.
>
> The Court: That is all I will ask you" (R. 98a-99a).

And when defense counsel insisted that the prosecutor "ought to satisfy the court that there is more to it than just a belief on his part," the prosecutor let the cat out of the bag by revealing that he relied on a confidential FBI report in his file allegedly indicating that petitioner was "the former business partner of Albert Anastasia and Harry Strasser in at least one *dress-contracting establishment*" (R. 99a).

The question propounded in the courtroom, however, omitted any reference whatever to an alleged partnership "in a dress-contracting establishment" or "in several corporations"; thereby conveying the thoroughly baseless inference that petitioner was a partner in dope peddling and racketeering. Defense counsel, therefore, objected to the question upon the ground that there was "utterly no foundation for it" and that it "was calculated to inflame the jury" (R. 101a). The court, however, without giving any limiting instruction to the jury, overruled the objection with the cryptic observation:

> "The Court: As I indicated, and the reason for my indication in chambers, I will allow it. You have an exception" (R. 101a).

And when defense counsel tried to impress upon the court the seriousness of the prejudice created by allowing the question, the court replied:

> "The Court: You have an exception. That is the best we can do under our system" (R. 120a).

It would be cynical, indeed, to say that the prejudice engendered is the price an accused must pay for offering proof of his good character for truthfulness and honesty. The law exacts no such price. The prosecutor had, of course, a right "to test the qualifications of the witness to bespeak the community opinion" by asking the witness whether he heard of specific acts of misconduct incompatible with the character vouched for on direct examination. *Michelson* v. *United States*, 335 U. S. 469, 483-484. But this did not give him a license to condemn the accused by sinister innuendo and unfounded accusation. In the words of Justice Jackson in the *Michelson* case, at page 481, the prosecutor may not propound "a groundless question to waft an unwarranted innuendo into the jury box."

It must be remembered that the jury did not know what the prosecutor's "offer of proof", made in their absence, really disclosed. They were not told that suspicion of partnership "in a dress-contracting establishment" was the sole prop upon which the prosecutor framed his question. It is fair to say that the jury had confidence that the court would not permit the sinister imputations of partnership with a dope peddler and a notorious gangster to be presented to them, if the "offer of proof" did not supply some

basis for the imputations. This was undoubtedly reinforced by the court's charge to the jury four days later that the prosecutor's question "was relevant" (R. 214a), which instruction was immediately preceded by the gratuitous charge that:

> "It may be that those with whom he (petitioner) had come in contact previously had been misled and that he did not reveal to them his true character" (R. 213a).

2.

The government's brief attempts to argue that in the conference in chambers petitioners' counsel in effect waived his objections. We are told that "petitioners' counsel volunteered that petitioner Giddins would take the stand so that the question would be proper on cross-examination" (Govt's Br. pp. 12-13).

This is indeed an amazing assertion. The clipped excerpt quoted at page 7 of the government's brief has been wrenched out of context. It ignores the vehement and repeated objections that the prosecutor's question was "without any foundation whatever" (R. 98a), that it was "so inflammatory that it deprives the defendant of an opportunity of a fair trial" (R. 100a), and that it was "calculated to inflame the mind of the jury against this defendant" (R. 101a). It also ignores the motion for a mistrial (R. 102a).

To say in the face of these unimpeachable facts that petitioners' counsel volunteered "that the question would be proper on cross-examination" of petitioner, who intended to take the witness stand, is indicative of the lack of merit

to the governmennt's opposition to the granting of certiorari.

3.

As to the prosecutor's thoroughly baseless and highly prejudicial representation that he was prepared to prove another subornation of perjury and his offer of Exhibit 9 purporting to support his accusation, the government seeks to have the error excused as harmless. It argues that petitioners were given the opportunity to reopen the case and that

> "There was no surprise, as the petitioners were clearly prepared and did offer considerable proof, both documentary and oral, in opposition to the government's evidence on this issue" (Govt's Br. p. 15).

The trouble with his argument is that the government had raised and forced petitioners to litigate a false issue. Nor is it correct to say that petitioners were not surprised or that they were "clearly prepared" to meet the prosecutor's unfounded accusation. The fact is that petitioners were taken by surprise; and were it not for a fortuitous four-day recess after the government rested its case, petitioners could not have gathered the documentary proof necessary to reveal the baselessness of the prosecutor's charge. Thus, the dates that appear on defense Exhibits A and A9 show that they were obtained from the Corporation Commission in Virginia on February 20, 1959 (R. 167a, 196a; photo copies were submitted to the court below).

As to the government's further contention that the error was harmless because the court ultimately charged the

jury "to disregard the entire evidence on this matter" (Govt's Br. p. 15), it suffices to say that instructions are easy to give but hard to follow. They could not erase the prejudice and confusion created during a substantial part of the trial.

4.

The government contends that sentence was required to be imposed under the general subornation of perjury statute (18 U. S. C. §1622) and not under Part II of the Interstate Commerce Act (49 U. S. C. §§322(a) and (c)). It argues that Congress did not see fit to include, in the subornation statute, as it did in the perjury statute (18 U. S. C. §1621), the qualifying phrase "except as otherwise expressly provided by law," and that "even if the exception clause were read into the subornation statute, neither perjury nor subornation penalties are 'expressly' provided in the Interstate Commerce Act" (Govt's Br. p. 16).

These contentions overlook the requirement that "even penal provisions must be 'given their fair meaning in accord with the evident intent of Congress'." *Rainwater* v. *United States*, 356 U. S. 590, 592-593. Congress has provided a lesser punishment for any knowing, willful, or otherwise fraudulent attempt to evade or defeat the regulation of motor carriers by means of "any false statement or representation, or by the use of any false * * * affidavit, deposition * * * or by any other means or device" (49 U. S. C. §322(c)). These provisions are broad enough to prohibit oral and written perjury committed before the

Interstate Commerce Commission, and hence to require the punishment therein provided.*

Thus, it has been held that where perjury or subornation of perjury is committed before the Interstate Commerce Commission, the lesser punishment provided by the Interstate Commerce Act must be applied, even though the prosecution was brought under the general perjury or subornation provisions of Title 18. *Epstein* v. *United States*, 196 Fed. 354, 356 (7th Cir.); *Morris Plan Industrial Bank* v. *Finn*, 149 F. 2d 591, 592 (2d Cir.). It should also be noted that this Court left the question open in *Hammer* v. *United States*, 271 U. S. 620, 625.

Petitioners' position is further supported by the Congressional intention not only to limit the punishment of all violations of the Motor Carrier Act to the imposition of fines, but also by the enactment of a comprehensive misdemeanor provision in Section 322(a) to cover any violation "for which the penalty is not *otherwise herein provided*".** Section 322(a) clearly rejects the punishment of any other criminal statute for a similar violation. *United States* v. *Beacon Brass Company*, cited by the government is completely inapposite because Section 145(b) of the Internal Revenue Code provided that the penalties in that

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* In *United States* v. *Beacon Brass Company*, 344 U. S. 43, 45-46, this Court held that a willful attempt to evade a tax in any manner was broad enough to include a perjury in a tax return. Similarly, here, an attempt to evade or defeat the provisions of the Motor Carrier Act by means of any false statement or oral and written perjury would be broad enough to include the present charge.

** See Statement of Senator Wheeler, author of the Motor Carrier Act of 1935, and Statement of Commissioner Eastman, both appearing on pages 18-19 of the petition herein; Statement of Mr. Chief Justice Warren in *Brown* v. *United States*, 359 U. S. 41, 56 (1959).

Section should be "in addition to other penalties provided by law."

Finally, the government's reference to the statement of a sub-committee of the Congress some 22 years after the enactment of the Motor Carrier Act of 1935 does not offer any reliable guide to what Congress earlier intended. Recently in *United States* v. *Price*, — U. S. —, 80 S. Ct. 326, 332 (1960), this Court stated that to infer an earlier Congressional intent by the views of a subsequent Congress was a "hazardous basis".

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be granted.

Respectfully submitted,

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April 25, 1960.